

ST 98-10

Tax Type: SALES TAX

Issue: Responsible Corp. Officer - Failure to File or Pay Tax

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS

v.

TAXPAYER, as resp. off.
of CORPORATION,

Taxpayer

No.
NPL: #
C O'Donoghue
Admin. Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Gust Dickett of Romanoff & Dickett, Ltd., for TAXPAYER; Mr. Alan Osheff, Special Assistant Attorney General for the Illinois Department of Revenue.

Synopsis:

This matter comes on for hearing pursuant to the taxpayer's timely protest of the Notice of Penalty Liability issued April 28, 1995 for use tax liability. Such Notice of Penalty Liability was issued to Mr. TAXPAYER (hereinafter "TAXPAYER" or the "taxpayer") as a responsible officer of TAXPAYER & Associates pursuant to Section 13.5 of the Retailers' Occupation Tax Act.

The issues to be resolved are 1) whether the taxpayer was a responsible officer of TAXPAYER and Associates and 2) whether the taxpayer's failure to pay the use tax due was willful.

Upon consideration of all the evidence, it is recommended that this matter be resolved in favor of the Department with regards to the purchase of office equipment and any unidentified purchases listed as exceptions by the auditor. With regards to the purchase of asbestos removal equipment and supplies, I find that the taxpayer did not willfully fail to pay the use tax due.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Notice of Penalty Liability, issued April 28, 1995, showing a total liability due and owing in the amount of \$84,955.56 for the period of February, 1987 through December, 1992. Dept. Ex. No. 1.
2. TAXPAYER was president of TAXPAYER & Associates during the tax period. Tr. p. 8. The corporation removed, enclosed or encapsulated asbestos hazards. Tr. p. 34.
3. The underlying corporate tax liability was predicated upon the purchase of consumable supplies and fixed assets. In many instances, the corporation failed to provide purchase invoices or other documentation. Tr. pp. 19, 20, 21; Taxpayer Ex. No. 1.
4. The auditor used the taxpayer's depreciation schedules to determine the fixed assets purchased during the audit period. Tr. p. 20. The company's accountant prepared these depreciation schedules. Tr. p. 20.
5. No invoices for fixed asset purchases were presented to the auditor for her review. Tr. p. 20; Taxpayer Ex. No. 1.
6. The second component of the tax liability consisted of the purchase of consumable supplies. Tr. p. 21. The auditor reviewed the company's check register and traced the checks through to any available purchase invoices. Tr. p. 21. The corporation failed to provide many of these purchase invoices to the auditor. Taxpayer Ex. No. 1.
7. During the course of the audit, the auditor requested invoices of Mr. TAXPAYER, (Tr. p. 28), and eventually issued a 60-day letter. No additional invoices were presented by the taxpayer. Tr. pp. 29, 30.
8. Taxpayer's customers included individuals, schools and government agencies. Tr. p. 40.
9. TAXPAYER's duties included making bids for work and overseeing work in the field. Tr. p. 40.

Conclusions of Law:

The Department seeks to impose personal liability on TAXPAYER pursuant to Section 13.5 of the ROTA, which reads, in pertinent part:

Any officer or employee of any corporation subject to the provisions of this Act who has the control, supervision or responsibility of filing returns and making payment of the amount of tax herein imposed in accordance with Section 3 of this Act and who willfully fails to file such return or to make such payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the corporation, including interest and penalties thereon; The Department shall determine a penalty due under this Section according to its best judgment and information, and such determination shall be prima facie correct and shall be prima facie evidence of a penalty due under this Section. ...

35 ILCS 120/13.5.¹ (formerly Ill. Rev. Stat. 1991, ch. 120, ¶ 452 ½).

The above section falls under the Retailers' Occupation Tax Act ("ROTA") and while the case at hand involves liability for use taxes, section 12 of the Use Tax Act incorporates section 13 ½ of the ROTA and provides for officer liability.

In determining whether an individual is a responsible person the courts have indicated that the focus should be on whether that person has significant control over the business affairs of a corporation and whether he or she participates in decisions regarding the payment of creditors and disbursement of funds. See, e.g., Monday v. United States, 421 F.2d 1210 (7th Cir. 1970), cert. denied 400 U.S. 821 (1970). Liability attaches to those with the power and responsibility within the corporate structure for seeing that the taxes are remitted to the Government. *Id.*

The Department established its *prima facie* case of personal liability against the taxpayer through the introduction of its Notice of Penalty Liability. 35 ILCS 120/13.5 (formerly Ill. Rev. Stat. 1991, ch. 120, ¶ 452 1/2); Branson v. Department of Revenue, 168 Ill. 2d 247 (1995). During the entire tax period, it is undisputed that the taxpayer was the president of the corporation. He claims that he was not responsible for the filing of the tax returns and offered his own testimony and that of his brother, Thomas TAXPAYER, who was the office manager until late 1991, to support his contention. Even assuming others in

¹ The Uniform Penalty and Interest Act, 35 ILCS 735/3-7, provides for a personal liability penalty for taxes incurred as of January 1, 1994.

the corporation shared responsibility for the payment of corporate taxes, the statute does not confine liability to the officer who is most responsible. Nothing in the record rebuts the presumption that the taxpayer had the power and responsibility within the corporation for ensuring that the taxes were remitted. The mere fact that other officers and employees also had control over financial matters does not exonerate TAXPAYER from liability or prove that he did not have the requisite control and responsibility as outlined under the statute. *See, Gephart v. Unites States*, 818 F.2d 469 (6th Cir. 1987).

For liability to attach under the statute, it must also be determined whether the taxpayer willfully failed to remit the use taxes due to the Department. Willfulness in regards to the statute is not merely limited to "intentional, knowing and voluntary acts". *Monday*, 421 F.2d at 1215. Willful conduct also encompasses a reckless disregard for obvious or known risks. *Id.* Furthermore, willful conduct does not require "bad purpose or an intent to defraud the government." *The Department of Revenue v. Heartland Investments*, 106 Ill. 2d at 29-30 (1985).

In *Branson*, 168 Ill.2d 247 (1995), the Illinois Supreme Court held that the introduction of the Notice of Penalty Liability was sufficient to establish a *prima facie* case of willful failure to pay retailers' occupation taxes. The burden then shifted to the taxpayer to rebut the presumption created with competent evidence. Taxpayer's contention that he did not willfully fail to pay the use tax due is premised upon his belief that the purchases of asbestos removal equipment and supplies for school and government projects were tax-exempt. Additionally, with respect to the purchase of office equipment and supplies, taxpayer claims that he paid tax on these purchases in the normal course of business.

The record reflects that the underlying corporation failed to provide sufficient books and records during the course of the audit. Purchase invoices or other documentation proving that tax was paid were not produced as required by Illinois law. *See*, 35 ILCS 120/7; 35 ILCS 105/12. Reviewing the audit report, one can see that the exceptions listed by the auditor fall into one of three categories: 1) purchases of items, such as office equipment, which are not directly related to the taxpayer's business of asbestos removal, 2) unidentified purchases, where no invoice was presented, thus it is impossible to determine the nature of the item, and 3) purchases of items used directly in the taxpayer's removal of asbestos.

Taxpayer does not argue that he was unaware that tax was due on purchases of office supplies, rather, upon reviewing the auditor's exception list, he testified that he paid tax on these types of purchases in the normal course of business. His brother's testimony echoed this claim. However, taxpayer's mere oral testimony without corroborating documentary evidence such as the sales invoices is insufficient to rebut the *prima facie* correctness of the Department's determinations. A.R. Barnes v. Department of Revenue, 173 Ill. App. 3d 826 (1st Dist. 1988). Furthermore, the taxpayer had the opportunity to dispute the Department's assessment against the underlying corporation by protesting the Notice of Tax Liability. Since he chose not to do so, the Department's assessment is correct, as a matter of law. *See, Department of Revenue v. R.S. Dombrowski Enterprises*, 202 Ill. App. 3d 1050.

With respect to the unidentified purchases listed on the audit report, I find that I cannot determine the nature of these items and whether they relate to asbestos removal or not. Thus, clearly, the taxpayer failed to present sufficient evidence of his lack of willfulness as to these purchases.

Having considered the evidence and testimony presented concerning the purchase of items directly related to the removal of asbestos and having given consideration to the fact that asbestos removal equipment and supplies, in many instances, qualify under the pollution control exemption, I find that the taxpayer offered credible testimony, as to his belief that purchases of asbestos removal supplies were tax-free. Therefore, taxpayer has successfully rebutted the presumption of willfulness with regards to items identified on the audit report as directly related to asbestos removal.

For the reasons outlined above, I find that the taxpayer willfully failed to remit the use tax on the following purchases of equipment and supplies. These items represent purchases for the corporation's office or are unidentifiable purchases, i.e., purchases which have not been shown to be directly related to asbestos removal, due to taxpayer's failure to produce sufficient books and records as required by law during the audit of the underlying corporation or his failure to identify them in the present matter.

Fixed Assets

<u>Date</u>	<u>Description</u>	<u>Amount</u>	<u>Date</u>	<u>Description</u>	<u>Amount</u>
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12/31/87	Furniture	\$6576.10	4/1/90	fax mach	668.75	
1/1/88	1224	Office Equipment	272.85	6/1/90	carpet	711.95
1/16/88		Humidifier	218.24	6/1/90	office furn	294.23
5/1/88		office equipment	1302.19	6/1/90	alarm system	1180.00
5/1/88		dep on alarm	700.00	7/1/90	missing	209.72
7/1/88	1859	office outlet products	906.99	7/1/90	missing	603.82
7/1/88	1825	American Bus. Ph	1300.00	7/1/90	missing	378.85
8/1/88	1972	computer	3702.00	7/1/90	missing	3385.25
9/1/88	2152	american bus-fax	800.00	8/1/90	missing	3337.01
9/1/88	2111	missing	583.15	8/1/90	missing	659.94
10/1/88		miracle water co.	2100.00	8/1/90	desk chair	866.64
11/1/88		trailer downpayment	1500.00	9/1/90	missing	100.00
12/31/88	2401	missing	1417.54	9/1/90	missing	2145.00
12/31/88	2419	missing	257.44	10/1/90	conf cabinet	1513.74
12/31/88	2426	missing	1803.00	11/1/90	shelves	382.65
12/31/88	2427	missing	1213.80	11/1/90	office table	352.72
12/31/88	2447	missing	1954.64	11/1/90	carpet	395.50
2/2/89	2707	missing	1757.25	12/1/90	office cabinets	687.25
3/31/89	2741	missing	5501.75	12/31/91	missing	2500.00
3/31/89	2740	missing	1516.19	12/31/91	missing	7569.18
4/30/89	2878	missing	1601.79	12/31/91	missing	531.48
5/31/89	2965	phone equip	564.00	12/31/91	trailer	3281.00
6/30/89	3123	missing	1450.65	12/31/91	missing	743.07
7/31/89	3285	missing	1548.29	1/1/92	missing	500.00
7/31/89	3289	missing	1178.52	2/28/92	missing	911.46
9/30/89	3638	missing	510.00	3/1/92	vcr	374.49
9/30/89	3685	car phones	1698.00	3/1/92	wallpaper	448.54
1/1/90		missing	924.48	3/1/92	computer	647.50
1/1/90		missing	2211.60	4/1/92	electrical	1069.75
				4/1/92	computer	2590.34
				6/1/92	missing	1600.00
				12/1/90	doors	600.00
				4/1/92	computer	647.50

Consumable Supplies

<u>Date</u>	<u>Description</u>	<u>Amount</u>
1/11/91	computer supplies	260.00
1/21/91	shelf brackets	141.00
2/18/91	office supplies	179.00
2/28/91	office supplies	184.00
3/5/91	office supplies	97.44
3/5/91	computer equipment	79.88
3/5/91	office supplies	15.78
3/5/91	office supplies	105.00
3/18/91	office expense	32.00
3/22/91	office expense	150.00
3/25/91	saab tires	725.93
3/31/91	office supply	54.50
5/14/91	office expense	531.48
5/14/91	office supplies	15.95
6/20/91	advertising	180.48
6/28/91	office supplies	17.12
7/2/91	advertising	243.37
7/2/91	advertising	2225.94
7/24/91	marketing	162.34
7/25/91	missing	3830.76
7/29/91	office cabinets	458.16
7/29/91	missing	895.00

8/16/91	missing	100.00
8/19/91	missing	1000.00
8/20/91	computer books	27.90
8/20/91	office expense	49.95
9/24/91	office supplies	116.95
9/26/91	office supplies	17.95
10/8/91	missing	574.61
10/11/91	missing	121.82
10/14/92	missing	548.92
10/18/91	missing	277.49
10/29/91	missing	1149.16
10/31/91	missing	60.00
11/7/91	computer supplies	151.00
11/15/91	missing	1725.00
12/3/91	missing	250.80
12/3/91	missing	40.00
12/3/91	no tax paid	1243.95
12/4/91	missing	802.95
12/10/91	missing	100.00
12/27/91	missing	500.00
12/31/91	missing	540.00
12/31/91	missing	963.35
12/31/91	missing	3155.12
12/31/91	missing	1674.96
2/11/91	marketing	1000.00

WHEREFORE, for the reasons stated above, it is my recommendation that the Notice of Penalty Liability be finalized, as amended by my finding that the taxpayer did not willfully fail to remit the use tax due on the asbestos removal equipment and supplies.

Christine O'Donoghue
Administrative Law Judge